

“

”

GZ J KDKE"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATHY ECHEVARRIA,

Plaintiff,

Case No.: 1:13-CV-4980

v.

DIVERSIFIED CONSULTANTS, INC.,

Civil Action

Defendant.

**DECLARATION OF MAVIS PYE IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Mavis Pye, pursuant to 28 U.S.C. § 1746, being of full age, hereby declares as follows:

1. I am the Compliance Manager for Defendant, Diversified Consultants, Inc. ("DCI"). As such, I am fully familiar with the records and history of this matter and fully authorized to make this Declaration. I make this Declaration in support of Defendant's motion for summary judgment.

2. On or about January 27, 2013, DCI received an account from its client to collect a past due debt owed by a Magda Molano. Along with all of the other information sent to DCI by its client, the telephone number 917-226-1803 (the "Telephone Number") was included as one of the numbers where Ms. Molano could purportedly be reached. In fact, it now appears that the Telephone Number belonged to Plaintiff.

3. DCI called the Telephone Number for the first time on January 31, 2013, and continued to do so in an attempt to reach Ms. Molano. DCI never reached a live person.

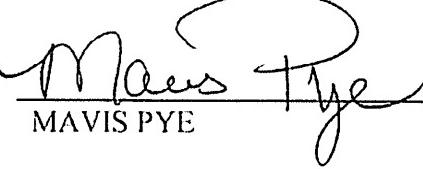
4. DCI kept calling the Telephone Number until March 25, 2013 when it received a copy of this lawsuit. That is the first time DCI was ever made aware that the Telephone Number did not belong to Magda Molano.

5. The telephone system used by DCI is manufactured by LiveVox.

6. In reaching a decision to use the LiveVox system, DCI relied upon, among other things, a memo it received from LiveVox (the "LiveVox Memo") which stated that the LiveVox system "does not have the capacity to store or produce numbers to be called using a random or sequential number generator." Attached hereto as Exhibit A is a true and correct copy of the LiveVox Memo.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 6, 2014



MAVIS PYE

A handwritten signature in black ink, appearing to read "Mavis Pye", is written over a horizontal line. Below the signature, the name "MAVIS PYE" is printed in a smaller, sans-serif font.

EXHIBIT A



THE TELEPHONE CONSUMER PROTECTION ACT

Introduction

The Telephone Consumer Protection Act ("TCPA") creates liability for calls made to cell phones using an Automatic Telephone Dialing System ("ATDS") or an artificial or pre-recorded voice without the consent of the called party. The TCPA is subject to varying interpretations based on a host of factors. Since its inception, the courts and the FCC have attempted to clarify it, but uncertainty persists.

LiveVox accordingly cannot offer legal advice, and this document does not constitute legal advice. But we do offer some risk-mitigation strategies to our customers. LiveVox customers are urged to consult with their own experienced legal counsel to independently review the contents of this document, and any compliance measures they undertake.

Automatic Telephone Dialling System

The TCPA states that the term "automatic telephone dialing system" means equipment which has the capacity—

- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
- (B) to dial such numbers.

A key question is whether LiveVox's platform has the *capacity* to perform the functions indicated. In our view, it does not. Our view is that the LiveVox Application Service, while able to store or produce telephone numbers to be called, does not have the *capacity* to store or produce numbers to be called *using a random or sequential number generator*.

We note that our view is not unanimously held, with one court ruling that LiveVox's Application Service is indeed an ATDS that is subject to the TCPA. We believe that ruling to be incorrect, and based on insufficient briefing in which LiveVox did not participate.

Risk Mitigation

While we cannot offer legal advice or make definitive pronouncements, we can relate some risk-mitigation measures. One risk-mitigator that some of our customers find helpful is a cell phone scrub. A cell phone scrub is designed to exclude cell phone numbers from a call list. As with any feature that relies on third parties to maintain updated and accurate information, LiveVox cannot guarantee 100% accuracy, but in our experience, the cell phone scrub is very effective at excluding cell phone numbers.

LiveVox also offers a dynamic cell phone scrub, by which calls to numbers on the cell phone list can be made in Preview Dialing mode. Because Preview Dialing requires an agent to click a button before the call is made, we believe that using Preview Dialing would not be considered an ATDS, particularly with regard to the FCC's interpretation of what constitutes an ATDS.



Although we cannot validate our viewpoint through any explicit legal ruling, we are not aware of any legal ruling that contradicts our viewpoint.

We are also aware that some collection agencies will obtain verbal opt-ins from called parties, authorizing the agency to continue calling that particular number. This helps contribute toward consent.

Finally, leaving an answering machine message may well create more risk than not leaving one. For that reason, we have seen some customers reduce the number of messages that they leave.

Artificial or Prerecorded Voice

The TCPA is also triggered under other circumstances, such as when certain calls are made to a cell phone, without consent, using an "artificial or prerecorded voice" (even if not made on an automatic telephone-dialing system).

Conclusion

As always, customers should independently review and consider the practices referenced above to see whether they would be useful from an operations as well as a compliance standpoint. LiveVox is available to offer further support and information as needed.